

(July 22d, 1724.)

A N S V V E R S for Mr. *Patrick Middleton* and his Spouse,

T O T H E

Petition of *James Johnston* and his Spouse.

FOR answering the Grounds of the Petition, I shall fairly exhibite the present State of the Two contingent Processes to which it relates.

Mr. *Johnston* and his Wife having, for ordinary, had the Key of my House, from April 1723, till November thereafter, at which Time I came with my Family to Town, and found my House very much disordered, and several particular Goods amissing: Therefore I commenced a Process before the Sheriffs against the Petitioners for the Value thereof; and thereafter upon a procured Warrant for Searching, a Tongs, and some Table Knives belonging to me were found in their House, in Presence of a Notar and famous Witnesses, and were put in the Sheriff Clerk's Hands.

After some Progress in our said Action, Mr. *Johnston* advocate the same; but in February last it was remitted, with an Instruction; and being thereafter called upon the 20th of March last, Mr. *Johnston* and his Spouse being judicially examined on the Point mentioned in the Act of Remit, viz. If they had the Possession of the Key of the Lodging the Time the Pursuers were in the Country, save at the Time I had Occasion to be in Town, or the Servants marketing, or otherwise: They both deny the same, and both sign this Denial, as appears from my said Process: And I proceeded therein this Session; and upon the first Instant, the Sheriff allowed me to prove their having of the said Key, and the Property of the said Tongs and Knives, &c. And when I had cited Witnesses, and they were ready to depone thereanent, Mr. *Johnston* very hastily upon the 7th Current, *celata veritate & expressa falsitate*, procured and expedie an other Advocation of my said Cause.

While my Process was so depending last Session, Mr. *Johnston* thought proper to raise a Summons of Spuilie and Defamation against us, and Mr. *Crawford*, one of the Sheriffs, for granting the said Warrant to search, and the taking away of my Tongs and Knives in Manner foresaid. And this Process falling by Course in June last before the Lord *Pancatland*, the Petitioners were allowed to prove their Libel, and the Property of the said Tongs and Knives as belonging to them; and the 10th Instant being assigned for that Effect, they very speedily adduced four Witnesses upon the 14th, and the next Day they made *Avissandum* therewith, and immediately gave a Petition craving summar advising; and as it was ordered, so the Cause was put up, and stood in the summar Roll upon Saturday last: But the Day before, I gave your Lordships a Petition, representing Mr. *Johnston*'s artful and prejudicial Management, and that your Lordships had the Wednesday preceeding, upon another Petition for me, found, That I ought to adduce my Probation anent the Property of the said Tongs and Knives, allowed by the Sheriffs, as said is, and that notwithstanding of the Petitioners late Advocation of my Cause; seeing both the Processes terminate in a conjunct Probation upon the contended Property of the said Tongs and Knives: Therefore your Lordships superseded advising Mr. *Johnston*'s Proof, until my Witnesses should depone, and that the whole Proof might come in duly prepared together, and granted me Diligence.

This is the just State presently of both Processes; so that it is surprizing, after Mr. *Johnston* hath concluded his Probation, made *Avissandum* therewith, and inrolled the same by Order for advising, he should have the Confidence by his present Petition, to crave new Letters of incident Diligence for adducing of Witnesses to answer to any Part of his Interrogators, in relation to the Tongs and Knives, Custody of the Key, or Manner how I, my Spouse and Servants were in Use to call for the same, and enter the said House.

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We shall endeavour to save him the intended Trouble and Expence ; and therefore we do admit, that several Times I and my Servants upon Market Days, have called for the Key from the Petitioners, and gone into the House, and immediately thereafter delivered it back again to them ; and as to my going in once at a Window by the help of a Ladder, the Fact was, that in September last I being detained in Town till after eight at Night, at which Time the Petitioner's Shop was shut, and not finding either him or his Wife to deliver the Key, I carried it to the Country, and next Day I returned ; but not knowing then of any use I would have for it, I did not bring it along ; yet at two a Clock that Day, I understood a Meeting was suddenly called against three, in which the Administrators of the Fund of Charity were to order a Distribution, which could not be made till the Money then in my Hands was given in to those who were to distribute : And because an Express could not bring the Key in Time, and being averse to incur the Suspicion of not having the Money collected by Charity in readiness, I called for a Sclaters Ladder, and entered my House by a large Window at Mrs *Johnson's* Sight, and brought out above 2000 *L. Scots* in Bank Notes, by which the Distribution was rendered effectual.

Since these Facts are so admitted, I can not comprehend how in Justice, Law or Form, the Petitioners can be any ways intitled to a new Probation as desired : And I shall only observe,

1^{mo}, That if he had not been eminently and speedily upon the undue catching of Advantage, he would have been more deliberate in his Conduct : But since he hath put the Fate of his Cause upon his Probation adduced, and concluded in Manner fore said, he cannot by any Form be allowed a new Probation, and surely his Procedure deserves no Favour ; and if his Desire should be granted, it would not only be prejudicial to me, but also be an Encouragement and Precedent for others to try their irregular Art and Haste by Catches ; and when at last, they are by Justice disappointed, then they will have Recourse to a new Probation, there is no Speciality in the present Case for breaking the Forms in his Favours, my Procedure hath been all along fair, and stands upon a just Foundation against him.

2^{do}. When your Lordships compare the Petitioner's sign'd Denial of having the Key, in the precise Terms abovementioned, with their present Petition, they appear contradictory upon that Point ; and some People ought to have at least good Memories.

3^{io}. All the Contents of the Petition signify nothing to the present Question ; for he hath never said nor offered to prove, that I or my Servants, when we had accidental Occasion to be in the House, did convey my said Tongs and Knives into his House, which upon the Search were found there ; and I have asked him, How they came there ? but he has been still silent thereanent, and has taken himself to an Imagination, that they belong to him in Property ; and I am apprehensive, it will eventually be found, he has adduced abundance of Witnesses already upon that Point.

4^{to}. It is not Fact, that the Key was left with their Servant-Maid, whose Mother nursed a Child to my Wife ; for that Maid is cited as a Witness at my Instance ; and I'm hopeful she will depone, that when she called for the Key upon a Fast-Day from me, I expressly refused to give it, but delivered it to her Mistress, and that she was never intrusted with the said Key by me or any belonging to me.

In respect whereof, the Desire of the said irregular and groundless Petition ought to be refused.

According to Justice, and your Lordships Answer.

PAT. LEITH

